JOK JAU EVONG & ORS.

v.

MARABONG LUMBER SDN. BHD. & ORS.

HIGH COURT SABAH & SARAWAK, KUCHING
HAIDAR MOHD. NOOR J
[SUIT NO. KG. 256 OF 1988]
25 JUNE 1990

CIVIL PROCEDURE: *Action by public officers - Challenge should be taken within 36 months - Delay or laches - Statute barred - Section 2 Public Authorities Protection Act.*

NATIVE LAW AND CUSTOM: *Definition of - Elements to be satisfied - Sections 25, 15 of Land Code.*

CIVIL PROCEDURE: *Representative action - Common interest test - Striking out - Reasonable cause of action - Order 15 r. 12(1), O. 18 r. 19 Rules of the High Court 1980.*

The plaintiffs, in a representative action on behalf of themselves and all other proprietors of native customary land, claim that the 3rd defendant wrongfully granted a timber licence to the 2nd defendant in relation to land which they claim includes their native customary land. In 1951 the 3rd defendant's predecessors proclaimed the said land a protected forest subject to the certain rights of communities to farm their secondary forest (temuda); the defendants claim that the subject land is state land and that the claim of the plaintiffs is limited to the secondary forests only (which the defendants did not extract timber from). The plaintiffs argue that their native rights relate to the whole land (menoa) and not just temuda land. As a result the plaintiffs sought various declarations that the proclamation and timber licence were invalid. The defendants filed proceedings for striking out of the plaintiffs proceedings under O. 18 r. 19 of the Rules of the High Court 1980 (RHC), arguing that the plaintiffs' action was not one that fell within O. 15 r. 12(1) of the RHC.

The issues for determination were whether in this case, there are numerous persons having the same interest in the present proceedings, whether native customary land is recognised by the law and whether the limitation period bars these proceedings.

Held:

[1] The plaintiffs filed this action as a representative of the Kayan community and Kayan is a native race specified in the schedule to the Interpretation Ordinance. Therefore native customary rights, whether communal or otherwise are recognised by the law - see ss. 2, 5 and 15 of the Land Code.

[2] If any member of the Kayan community can establish their native customary rights then such rights are adequately protected by the law and if they can show or prove infringement of their native customary rights then the Kayan natives having such rights will have such benefits if the relief claimed is successful - see Lord Mc Naughten in *Bedford's* case.

[3] The essential qualification of a representative action is that the persons who are to be represented and the persons representing them have the same interest in the same proceeding as envisaged by O. 15 r. 12 of RHC; this element is satisfied on the facts of this case.

[4] Under s. 2 of the Public Authorities Protection Act, any action taken to challenge the proclamation or the issue of the timber licence must be commenced within 36 months of the act complained of; no attempt was made by the plaintiffs to enforce any legal rights over

the alleged area (although they were aware of the proclamation as far back as the 60's) for the alleged acts of dispossession until the present suit was filed; consequently the action of the plaintiffs is statute barred against the 3rd defendants. Therefore, the action against the 1st and 2nd defendants also fail as the proclamation and the timber licence are deemed to be valid.

[Plaintiffs' application dismissed.]

Cases referred to:
Wenlock v. Moloney [1965] 1 WLR 1238
Tractors (M) Bhd. v. Tio Chee Hing [1975] 2 MLJ 1
A.G. of Duchy of Lancaster v. L. & N.W. Ry. Co. [1892] 3 Ch 274
Nagle v. Feildon [1966] 2 QB 633
Jackson v. British Medical Association [1970] 1 WLR 692
Davey v. Bentick [1893] 1 QB 185
More v. Lawson [1915] 31 TLR 418
Smith v. Cardiff Corporation [1953] 2 All ER 1376
Bedford (Duke) v. Ellis [1901] AC 7
John v. Rees [1969] 2 All ER 274
J. Bollinger S.A. v. Goldwell [1971] RPC 412
Dismore v. Milton [1938] All ER 762
Riches v. Director of Public Prosecution [1973] 2 All ER 935
Saw Seng Kee v. Director of Lands and Mines, Penang [1987] 1 MLJ 80
Ara binti Aman & Ors. v. Superintendent of Lands and Mines 2nd Division [1975] 1 MLJ 208
Tio Chee Hing & Ors. v. Government of Sabah [1981] 1 MLJ 207
Haji Hussain bin Hj. Ali & Ors. v. Datuk Hj. Mohamed bin Yaacob & Ors. [1983] CLJ (Rep) 165

Legislation referred to:
Forest Ordinance (Cap 126)(Sarawak), ss. 2(2), 49(2), 51(4), 90B
Forest Ordinance 1934, s. 29
Land Code (Cap 81) (Sarawak), ss. 2, 5, (2), 15
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 15 rr. 12, (1), O. 18 rr. 19, (1)(a), (b), (d), O. 20 rr. 1, 5, 8, O. 92 r. 4

Other sources referred to:
The Supreme Court Practice, [1988] p. 325
The Supreme Court Practice, [1988] Vol. 1, at p. 212

For the plaintiffs - Gurdial S. Nijar with M.S. Sandhu and Baru Bian; M/s. M.S. Sandhu & Co.
For the 1st & 2nd defendant - J.C. Fong with H.C. Sim; Reddi & Co.
For the 3rd defendant - Abdul Razak Tready Ag. Deputy State Attorney-General, State Attorney-General's Chambers

JUDGMENT

Haidar Mohd. Noor J:

The plaintiffs, by way of a representative action, filed this writ as amended pursuant to O. 20 r. 1 of the Rules of the High Court 1980 (RHC) (encl. 4) and sought the following:

1. A declaration that the plaintiffs have native customary rights over their land.
2. A declaration that this right precludes the 3rd defendant from impairing or abridging the plaintiffs' rights.
3. A declaration that the Proclamation dated 1 August 1951 (L.N. 188 of 1951), in so far as

it impairs the plaintiffs' customary rights over their land as well as to take forest produce, is bad.

4. A declaration that the 3rd defendant is precluded from issuing any licence which affects the plaintiffs' said rights.

5. A declaration that s. 90B of the Forest Ordinance (Cap. 126) is void.

6. A declaration that the impairing of the plaintiffs' rights constitutes a violation of Article 8 of the Federal Constitution (equality before the law).

7. A declaration that the act of the 3rd defendant in issuing the said licence is void and/or wrongful.

8. A declaration that the issuance of the licence constitutes a violation of Article 13 of the Federal Constitution. (No confiscation of property without adequate compensation).

9. A declaration that the issuance of the licence constitutes a violation of Article 5 of the Federal Constitution. (No person to be deprived of his life, except in accordance with law).

10. A declaration that the said contract between the 1st and 2nd defendants is illegal as it is in breach of ss. 2(2), 49(2) and 51(4) of the Forest Ordinance (Sarawak Cap. 126).

11. A declaration that the 1st defendant and/or its agent or servants are trespassing on the plaintiff's customary land and/or otherwise unlawfully interfering with the plaintiffs' rights over the land.

12. A declaration that the plaintiffs are entitled to vacant possession of the plaintiffs' customary land.

13. A prohibitory injunction restraining the 1st and 2nd defendants and/or their agents or servants from trespassing, entering or using the plaintiffs' customary land.

14. A mandatory injunction against the 1st and 2nd defendants to cease operations and remove all structures from the plaintiffs' customary land.

15. Damages.

16. Costs.

17. Such further or other relief as this Court deems just.

Consequent upon the filing of this writ by the plaintiffs, six applications were filed by both the plaintiffs and the defendants, *viz*.:

(i) summons in chambers dated 19 August 1989 (encl. 17) by the 1st and 2nd defendants under O. 18 r. 19(1)(a), (b) and (d) and O. 92 r. 4 of the Rules of the High Court for striking out the plaintiffs' writ and statement of claim or in the alternative in respect of the 1st defendant paras. 1 to 14 (both inclusive of the indorsement to the amended writ of summons) and paras. 4 to 13 of the amended statement of claim as well as prayers 1 to 14 be struck out.

(ii) summons in chambers dated 22 August 1989 (encl. 19) by the 3rd defendant under O. 18 r. 19(1)(a), (b) & (d) and O. 92 r. 4 of the Rules of the High Court 1980 for striking out the plaintiffs' amended writ and amended statement of claim.

(iii) summons in chambers dated 18 September 1989 (encl. 22) by the plaintiff under O. 29 of

Rules of the High Court 1980 for interim injunction.

(iv) summons in chambers dated 2 November 1989 (encl. 39) by the plaintiffs under O. 20 r. 5 of the Rules of the High Court for re-amendments.

(v) summons in chambers dated 9 March 1990 (encl. 59) under O. 20 r. 5 of the Rules of the High Court 1980 by the plaintiffs for re-amendments.

(vi) summons in chambers dated 17 March 1990 (encl. 63) under O. 20 r. 8 of the Rules of the High Court 1980 by the 3rd defendant for additional grounds to be added to its earlier summons in chambers (encl. 19).

On 9 December 1989 Madam Jagjeet Kaur Sandhu, Counsel for the plaintiffs withdrew the summons in chambers (encl. 39) with liberty to file. Counsels for 1st, 2nd and 3rd defendants did not object to the application and I accordingly struck out encl. 39 with liberty to file. It was agreed then that the application for re-amendment to be filed by the plaintiffs and the applications to strike out the plaintiffs' action by all the defendants be heard together as the issue of representative action is relevant for argument in both applications and the matter was adjourned in both applications and the matter was adjourned to 26 and 27 March 1990 for hearing.

At the subsequent hearing on 26 March 1990 the following matters were agreed upon:

(a) Counsels for the plaintiffs and the 1st and 2nd defendants consented to the application of the 3rd defendant for the additional grounds (encl. 63).

I gave order in terms accordingly.

(b) Counsels for the 1st, 2nd and 3rd defendants consented only to prayer 1 of the application of the plaintiffs as per encl. 59.

I gave order in terms of prayer 1 only.

In respect of the withdrawal of the application for re-amendment (encl. 39) by Ms. Sandhu with no objections from Counsel for the 1st, 2nd and 3rd defendants and the consequential order that I made striking it out by consent, such an order was really unnecessary and in fact a duplication as on going through the record of the proceedings earlier on, encl. 39 had, by consent, been struck out by me on 9 December 1989 with liberty to file. Hence the present application of the plaintiffs (encl. 59).

In the event, the applications for hearing before me are:

(1) application by the 1st and 2nd defendants (encl. 17).

(2) application by the 3rd defendants (encl. 19 as amended).

(3) application by the plaintiffs in respect of prayers (2) and (3) in encl. 59.

In respect of the application of the plaintiffs (encl. 22) regarding injunction I will hear it depending on my ruling in respect of the applications of the 1st, 2nd and 3rd defendants. It was agreed by the Counsels for all the parties that the applications of the 1st, 2nd and 3rd defendants be heard together with the remaining prayers of the plaintiffs' application for re-amendment in (encl. 59.) Various affidavits were filed by the respective parties relating to their applications.

During the course of the hearing of the three applications, Mr. Nijar, Counsel for the plaintiffs abandoned the following prayers:

(a) the issue on the unconstitutionality of the amended s. 90(B) of the Forest Ordinance as

in prayer 5.

(b) the issue of illegality of contract between the 1st and 2nd defendants as in prayer 10.

The Salient Facts

The plaintiffs are claiming on behalf of themselves and all other proprietors of native customary land, situated at Kampong Uma Bawang, Baram, Sarawak that the 3rd defendant through the Conservator of Forests or its agents/servants wrongfully granted Timber Licence No. T/0191 to the 2nd defendant for taking of forest produce from certain portions of land which they claimed includes their native customary land.

The 3rd defendant's predecessors on August 1951 *vide* L.N. No. 881 (not 188) of 1951 issued a proclamation under s. 29 of the then Forest Ordinance 1934 constituting the land enclosed within the boundaries described in the first schedule thereof a protected forest known as Lemiting Protected Forest with effect from 15 September 1951 subject to the rights admitted, privileges conceded and special conditions governing the protection of the communities to farm their secondary forest (temuda) as specified in the second schedule (see Exhibit 'LC1' annexed to the affidavit of Leo Chai at encl. 19).

The 3rd defendant initially issued Timber Licence No. T/0191 to Sarawak Timber Industry Development Corporation ("STIDC) on 1 June 1974 and the 2nd defendant was the logging/ marketing/processing contractor. When STIDC's licence expired in 1981, the 2nd defendant applied for and was issued with Timber Licence No. T/0191 on 18 April 1981, expiring on 31 May 1999 (see Exhibit "LC3"). The 1st defendant was appointed the logging contractor for the 2nd defendant on 31 January 1987. The appointment of the 1st defendant as logging contractor was approved by the Director of Forests *vide* letter dated 24 September 1988 (see Exhibit 'A' to encl. 17). The Timber Licence No. T/0191 covers the forest area in the Lemiting Protected Forest which the defendants claimed is state land.

The defendants asserted that the claim of the native customary land by the plaintiffs is confined to the secondary forests (temuda) and so protected in the Proclamation itself except that there is a restriction imposed on them not to clear high forest except with the authority of the Conservator of Forests otherwise it shall be an offence. According to the defendants the extraction of timber has always been carried out within the Lemiting Protected Forest and over areas of virgin jungle and not over the secondary forest (temuda) which the plaintiffs claimed to have native customary rights. The plaintiffs contended that the native customary rights acquired by them is not only confined to temuda land but relates as well to the whole of menoa land. In other words by declaring what they claimed is their customary land as Protected Forests *vide* L.N. 881 of 1951 the 3rd defendant has been able to grant rights to others over their customary land which will be against their rights over their alleged customary land. According to the plaintiffs they came to know only around 1987 about their alleged customary land had actually been carried out for commercial purposes. It is interesting to note that as far back as the sixties the people of the Kampong Uma Bawang knew of the existence of the Lemiting Protected Forest. This is clearly shown by the affidavit of Jok Jau Evong. According to Exhibit JJE 6B to encl. 57 para. 2 reads:

> Sepertimana yang kami dahulunya, dengan pihak Jabatan Kerajaan tertentu dan juga dengan pihak Kerajaan Koloni dahulu, telah berunding dan bersepakat pada tahun enam puluhan, kawasan tersebut adalah diketepikan dari "Lemiting Protected Forest" (LPF) dan ada beberapa 'plate' tanda khas Jabatan Hutan telah di lantak di pohon kayu di beberapa tempat strategik yang mana jadi tapak boundary di antara LPF dan NCR kami.

This letter acknowledges that the LPF is outside the native customary right NCR land of the residents of Kampong Uma Bawang. However they now contend that NCR extends to menoa land. Believing in their rights, the plaintiffs put up blockades or barricades across the logging road which cuts across their customary land resulting in arrests and being charged in Court though the charges were subsequently withdrawn. The plaintiffs further alleged that the agreements giving consent to the 1st defendant to build roads and log ponds on their customary lands were not freely given and pressures were allegedly put by the 1st defendant or its servants for the agreements to be signed.

The Law

Certain principles have been established through a number of authorities in an application under O. 18 r. 19 of Rules of the High Court 1980.

Order 18 r. 19 reads:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under para. (1)(a).
>
> (3) ...

No doubt para. (2) would show that where the **only ground** on which the application is made is that the pleading discloses no reasonable cause of action no evidence including affidavit evidence is admissible (see *Wenlock v. Moloney* [1965] 1 WLR 1238) but in an application on any other grounds as well as those mentioned in the rule or where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and ordinarily is used (see *Supreme Court Practice 1988*, p. 313).

The Privy Council in *Tractors (M) Bhd. v. Tio Chee Hing* [1975] 2 MLJ at p. 1 said, "the power to dismiss an action summarily without permitting the plaintiffs to proceed to trial is a drastic power. It should be exercised with the utmost caution." Being a drastic power the summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable (see *A.G. of Duchy of Lancaster v. L. & N.W. Ry. Co.* [1892] 3 Ch 274). It would appear therefore that it is to be implied in plain and obvious cases where the action is one which cannot succeed or is in some way an abuse of the process or the case is unarguable (see *Nagle v. Feildon* [1966] 2 QB 633). It cannot be exercised by a minute and protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action (see *Wenlock v. Moloney*, *supra*.)

On the meaning of reasonable cause of action, Lord Pearson in *Drummond - Jackson v. British Medical Association* [1970] 1 WLR at p. 692, said:

> No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r. 19(2)) only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

However, so long as the statement of claim or the particulars served under it (see *Davey v. Bentick* [1893] 1 QB 185) disclose **some** cause of action, or raise some question fit to be decided by trial, **the mere fact that a case is weak and not likely to succeed** is no ground for striking it out see *More v. Lawson* [1915] 31 TLR 418; *Wenlock v. Moloney*, *supra*).

It would appear to me that the 1st and 2nd defendants are relying more on r. 1(a) i.e. no reasonable cause of action though r. 1(b) and (d) were also cited therein and are further relying on the inherent powers of the Court under O. 92 r. 4 which reads:

> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The power to dismiss an action under the inherent jurisdiction of the Court on the ground that it is obviously frivolous or vexatious is discretionary, just as it is under O. 18 r. 19. When application is made to the inherent jurisdiction of the Court, all the facts can be gone into and affidavits as to the facts are admissible (see *The Supreme Court Practice 1988*, p. 325).

The Issues

From a perusal of the summons in chambers and the relevant affidavits filed and in view of the abandonment of their prayers 5 and 10 by the plaintiffs, the Court would have to determine the following issues:

(i) whether this action should or can proceed or continue as a representative action by the plaintiffs;

(ii) whether the claims by the plaintiffs for the declaratory orders have been barred by any law relating to limitation or whether their claims, if any, have been defeated by laches or acquiescence;

(iii) whether on the basis of the pleadings and the affidavits filed, the plaintiffs have any cause of action against the defendants.

(i) whether this action should or can proceed or continue as a representative action by the plaintiffs.

Representative action is provided under O. 15 r. 12 of the Rules of the High Court 1980 and the relevant paragraphs of r. 12 for the present applications are paras. (1) and (2) which read:

> 12 (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in r. 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
>
> (2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person named as a defendant, it shall make an order under r. 6 adding that person as a defendant.

The plaintiffs by their application (encl. 59) seek to re-amend their amended writ of summons and amended statement of claim (encl. 4), so I understand, to be in line with the title in the writ thus fully indicating the representative action of the plaintiffs. *The Supreme Court Practice 1988,* Vol. 1 at p. 212 stated as follows:

> Under O. 6 r. 3, the representative capacity of the plaintiffs or defendants must be indorsed on the writ of summons (see *Re Royle* [1877] 5 Ch. D. 540). The representative capacity of the plaintiffs or defendants ought also to be stated in the title of the writ and of the statement of claim (*Re Tottenham* [1896] 1 Ch. 628) and it is desirable that it should also be stated in the body of the statement of claim and in the prayer.

It would seem clear to me from the application of the plaintiffs (encl. 59) that its object is to put their representative action in a proper frame as stated in the above quoted passage and therefore I do not see the real objection to the plaintiffs' application by the defendants. In my view the granting of the application of the plaintiffs for re-amendment will not in anyway prejudice or embarrass the defendants' application as is borne out by the submissions of Counsel for the defendants, that is, whether the representative action of the plaintiffs satisfies the provisions of O. 15 r. 12 of Rules of the High Court 1980. Be that as it may the defendants seek to have the amended writ and amended statement of claim struck out on the ground that the action was not properly constituted as a representative action as it was not one that fell within the ambit of O. 15 r. 12(1) of the Rules of the High Court 1980. The issue for determination is whether there are numerous persons having the same interest in the present proceedings.

The representative proceedings under O. 15 r. 12 of our Rules of the High Court 1980 is similar to the English provision (also O. 15 r. 12). Sir Raymond Evershed MR in *Smith v. Cardiff Corporation* [1953] 2 All ER at p. 1376 quoted with approval the qualifications in the *dictum* of Lord McNaughten in *Bedford (Duke) v. Ellis* [1901] AC 7 regarding representative proceedings as follows:

> If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity... Given a common interest and a common grievance, a representative suit was in order if the relief was in its nature beneficial to all whom the plaintiffs proposed to represent.

Lord R. Evershed MR said at pp. 1376-1377, "it must be shown, first, that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all".

It is then pertinent for me to examine whether the qualifications have been satisfied in this case for it to be allowed to proceed as representative proceedings.

I think it is not disputed that the plaintiffs purported to represent a community called Kayans and they are residents of Kampong Uma Bawang. However from the affidavits it is equally not disputed that there appears to be two factions in this community, one group led by the plaintiffs through the Uma Bawang Action Committee and the other group led by the Tua Kampong who aligned themselves with the defendants. I would not give much consideration to the submission of Counsels for the defendants on the use of the word "proprietors" by the plaintiffs as I am of the view that such word is a misnomer. I think for want of a better word, 'proprietors' was used and used rather loosely. Be that as it may, in the present action the plaintiffs are claiming alleged native customary rights over the land under the proclamation

declared by the 3rd defendant's predecessor. The question is whether native customary land is recognised by the law in the first place. It would appear to be so as under s. 2 of the Land Code (Cap. 81) 'native customary land' means:

(a) land in which native customary rights, **whether communal or otherwise**, have lawfully been created prior to the 1 January 1958, and still subsist as such;

(b) land from time to time comprised in a reserve to which s. 6 applies; and

(c) Interior area land upon which native customary rights have been lawfully created pursuant to a permit under s. 10; (Emphasis added).

For the present case, I think the plaintiffs are relying on (a) above. The plaintiffs filed this action as a representative of the Kayan community there and Kayan is a native race specified in the schedule to the Interpretation Ordinance. As such it would appear that native customary rights whether communal or otherwise are recognised by the law i.e. the Land Code of Sarawak (see ss. 5 and 15 of the Land Code). In other words if native customary rights were established as at 1 January 1958 such rights shall subsist. The plaintiffs, in that event, would have satisfied the qualification as to common interest i.e. native customary right. In respect of common grievance, it would seem clear to me that by the proclamation the Kayan as a community would be deprived of their alleged native customary rights over the land proclaimed. In the result if the relief claimed is successful the Kayan as a community will continue to have the benefits of their native customary rights even to the extent of entitlement to grant in perpetuity for agricultural purposes free of premium, rent and other charges under s. 18 of the Land Code. Even though native customary lands shall continue to be state land where no document of title has been issued in respect thereof, any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and are not required to pay any rent as provided under s. 5(2) of the Land Code. Section 15 of the Land Code provides protection of native customary rights where one of the provisions is for payment of compensation to the persons entitled to such rights.

Section 15(1) reads:

> Without prejudice to s. 18, state land shall not be alienated until all customary rights therein have been surrendered or extinguished or provision has been made for compensating the persons entitled to such rights.

Given the relevant provisions of the Land Code, if any member of the Kayan community can establish their native customary rights then such rights, in my view, are adequately protected by the law and if they can show or prove infringement of their native customary rights then the Kayan natives having such rights will have such benefits if the relief claimed is successful. At the risk of being repetitive, the *dictum* of Lord McNaughten in *Bedford's* case, *supra*, is relevant when he said:

> ...if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity... Given a common interest and a common grievance, a representative suit was in order if the relief was in its nature beneficial to all whom the plaintiffs proposed to represent.

Though perhaps the rights of an individual may be affected but such rights depend on whether native customary rights can and are established over the Lemiting Protected Forests as such and therefore provides, in my view, the common interest in this case.

In respect of Mr. Fong's submission that there were two factions and therefore the plaintiffs cannot claim to represent all of the residents of Kampong Uma Bawang, I think, the case of *John v. Rees* [1969] 2 All ER 274 may provide the answer where Megarry J said at p. 284:

> The artificial nature of the process is shown by the fact that, as Fletcher Moulton LJ, pointed out in *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.* [1910] 2 KB 1039, a plaintiff suing in a representative capacity does not have to obtain the consent of those whom he purports to represent, and they are not liable for costs, though by estoppel or *res judicata* they will be bound by the result of the case.

Subject to the divisions in opinion between the two factions, the plaintiffs and those they purportedly to represent, all have common interest and a common grievance and seek relief beneficial to all they proposed to represent is they are successful in their action.

Mr. Fong urged the Court to exercise its discretion by relying on *J. Bollinger S.A. v. Goldwell* [1971] RPC 412 where even if "the common interest test" is satisfied the Court still has a discretion to strike out the writ where a representative action cannot be brought unless the whole of a claim is appropriate to that form of action. On the issue of trespass raised by Mr. Fong, in my view, this issue is related to the claim of the plaintiffs in respect of their native customary rights and in which event it cannot be said that the whole of the claim is not appropriate to the form of action filed therein. In my view this is a proper case where I should exercise my discretion in favour of the plaintiffs as I am satisfied that the essential qualification of a representative action that the persons who are to be represented and the persons representing them have the same interest in the same proceeding as envisaged by O. 15 r. 12 of the Rules of the High Court 1980 have been satisfied.

(ii) whether the claims by the plaintiffs for the declaratory orders have been barred by any law relating to limitation or whether their claims, if any, have been defeated by laches or acquiescence.

It is best that I consider the issue on limitation, laches or acquiescence first as even assuming that there is a reasonable cause of action against the defendants, if the defendants succeed on this ground alone then there is no necessity to consider the issue of reasonable cause of action.

In this case the defendants have not delivered their defence yet pleading the statute of limitation as a defence specifically. Though this would appear to be the practice and the observation made in the case of *Dismore v. Milton* [1938] All ER 762, the Court of Appeal in *Riches v. Director of Public Prosecution* [1973] 2 All ER 935 considered that the observation in *Dismore v. Milton, supra*, went too far. It held, not following *Dismore's* case, that where it was clear that the defendant was going to rely on the statute of limitations and there was nothing before the Court to suggest that the plaintiffs could escape from it, the claim would be struck out. His Lordship, Davies LJ in his judgment at p. 939 said:

> In the light of those more recent authorities, I think, as I say, that perhaps the observations of this Court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no reasonable cause of action, the limitation objection should or could prevail. In principle I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

In so far as the timber licence was concerned, it was first issued by the Director of Forests to STIDC in 1974 and later in 1981 to the second defendant. The proclamation of the Lemiting Protected Forest was issued in 1951. It is clear that the act of issuing the proclamation and the issue of the timber licence were acts done by public officers pursuant to written law or in the execution of their public duty. In that event, any action taken to challenge such action must necessarily be commenced within 36 months next after the act complained of i.e. the proclamation made in respect of the Lemiting Protected Forest or the issue of the timber licence. (see s. 2 of the Public Authorities Protection Act 1984 and *Saw Seng Kee v. Director of Lands and Mines, Penang* [1987] 1 MLJ 80. Equally clear, in my view, is that no attempt was made by the plaintiffs to enforce any legal rights over the alleged area for the alleged acts of dispossession until the present suit was filed and s. 2(a) of the Public Authorities Protection Act 1948 would seem to show that the action of the plaintiffs is statute-barred and the Court cannot accordingly take cognizance of their claim (see *Ara binti Aman & Ors. v. Superintendent of Lands and Mines 2nd Division* [1975] 1 MLJ 208 and *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207).

Further the Federal Court in *Haji Hussain bin Hj. Ali & Ors. v. Datuk Hj. Mohamed bin Yaacob & Ors.* [1983] CLJ (Rep) 165 at p. 169 noted regarding the delay in filing the suit for services terminated as follows:

> We note that these subsequent suits were filed approximately 43 months, 46 months and 45 months respectively after the letter terminating the appellants' services were sent to them and therefore well after the three year limit prescribed by s. 2(a) of the Public Authorities Protection Act 1948.

Further on the same page, the Federal Court held as follows:

> Now the granting of a declaratory judgment is a matter purely at the discretion of the Court. We do not think that the circumstances surrounding the present appeals would justify our exercising this discretion in favour of the appellant where there has been, in our view, unreasonable vacillation and delay. We set down hereunder a passage from p. 191 of the declaratory judgment by Zamir:
>
> > This discretion is employed, as discretion was originally employed in respect of all equitable remedies, primarily to do justice in the particular case before the Court. It is wide enough to allow the Court to take into account virtually all objections and defences possible in equitable proceedings. Thus, for instance, in one declaratory action the Court took into consideration the motives of the plaintiff in bringing the action (*Everett v. Griffiths* [1924] 1 KB 759, 767) the Court held that the plaintiff had waived his right to take the proceedings and, further assumed that the claim might also be dismissed on the ground of undue delay ("laches") (Limitation Act 1939).

Here no reasons were given by the plaintiffs for the delay in their action except that they only came to know of the infringement of their rights when the first defendant started the work in 1987. It should be noted, however, that the affidavit of Jok Jau Evong (encl. 57), Exhibit JJE 6B would seem to show that the plaintiffs were aware of the proclamation as far back as the sixties and they did not challenge the validity of the proclamation then. To challenge the validity of the proclamation of Lemiting Protected Forest now, in my view, is a bit too late at this point of time. If the plaintiffs sleep on their rights then they take the risks that their rights may be extinguished.

In the circumstances there was nothing to suggest that the plaintiffs can escape from the provisions of s. 2(a) of the Public Authorities Protection Act 1948. If the plaintiffs' action against the third defendant is statute-barred it follows therefore that the action against the

first and the second defendants must also necessarily fail as the proclamation and the timber licence are deemed to be valid. In that event there is no necessity for me to consider the issue of reasonable cause of action, if any.

The issue of trespass is applicable as against the first defendant only. This is in respect of the use of the temuda land (not included in the Forest Licence No. T/0191) for the construction of logging roads and log pond. From the various affidavits filed it would show that the first defendant was allowed onto the temuda land and if that is so, there is no question of trespassing. The fact that the agreement may be illegal is irrelevant to the issue whether the entry onto the temuda land of the plaintiffs or those they claim to represent was with or without justification or lawful authority of the owners. The issue of trespass may be applicable only if I hold there are issues that ought to go for trial in respect of the plaintiffs' native customary rights over the Lemiting Protected Forest. Here, I am of the view that the plaintiffs' claim for declarations that the Lemiting Protected Forest and the timber licence are invalid is statute-barred.

In the result I would allow the applications of all the defendants and dismiss the plaintiffs' action with costs to be taxed unless agreed. In view of my judgment I make no order as to the plaintiffs' application for re-amendment as in encl. 59.

Also found at [1990] 2 CLJ 625